12-26-2013

# State v. Diehl Respondent's Brief Dckt. 40044

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| STATE OF IDAHO,<br><br>Plaintiff-Respondent,<br><br>vs.<br><br>BRUCE L. DIEHL,<br><br>Defendant-Appellant. | ) | No. 40044<br><br>Clark Co. Case No. CR-2011-17 |

# BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLARK

HONORABLE JOEL E. TINGEY
District Judge


LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

SPENCER J. HAHN
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712




ATTORNEY FOR
DEFENDANT-APPELLANT

# TABLE OF CONTENTS

PAGE

# TABLE OF AUTHORITIES

**STATUTES**



**RULES**

## STATEMENT OF THE CASE

### Nature Of The Case

Bruce L. Diehl appeals from the district court's order denying his Rule 35 motion for correction of an illegal sentence.

### Statement Of The Facts And Course Of The Proceedings

Diehl was charged with felony eluding a police officer and felony malicious injury to property (R., pp.21-24),[1] and following trial, a jury convicted him of both offenses (R., pp.44-46). At the sentencing hearing, Diehl told the district court that rather than being placed in the retained jurisdiction program, "[y]ou might as well send me to do my time, Your Honor." (Tr., p.318, Ls.12-22.) The district court advised Diehl that, once he got to the retained jurisdiction ("rider") program, he was free to decide whether he wanted to participate in that program and advise the Department of Correction if he did not. (Tr., p.318, L.23 - p.319, L.25.) The district court sentenced Diehl to four years with one and one-half years fixed for felony eluding a police officer, and four years with two years fixed for felony malicious injury to property, and retained jurisdiction for up to one year. (R., pp.70-74.) Diehl filed a timely notice of appeal from his judgment of conviction. (R., pp.79-80.) The record does not indicate that, once Diehl went on his rider, he ever

[1] Two Clerk's Records have been provided to the state on appeal. The shorter of the two records has 129 numbered pages, and was made in the normal course of Diehl's appeal from his judgment of conviction. The larger Clerk's Record has 200 numbered pages, and was prepared after Diehl's Rule 35 motion was denied. All references to the record refer to the larger of the two Clerk's Records. It should be noted that the larger Clerk's Record contains ten misnumbered pages. The first pages numbered 91 through 100 appear to have been stricken by a large red "X" on page 91. After the first page numbered 100, the numbering resumes as page 91, and continues in correct sequence.

informed the Idaho Department of Correction that he preferred prison time to probation. At the end of his rider, the Department recommended that the district court place Diehl on probation, which it did on February 9, 2012. (R., pp.81-89, 183.)

On April 12, 2013, a Report of Probation Violation was filed alleging Diehl (1) had been in possession of drug paraphernalia and alcohol, tested positive for methamphetamine, and admitted using marijuana, methamphetamine, and a synthetic cannabinoid called "spice"; (2) associated with a known felon; (3) failed to report to his probation officer; (4) possessed multiple firearms and ammunition; and (5) was unsuccessfully discharged from his drug aftercare treatment group. (R., pp.91-100.) Diehl was arrested on a bench warrant on April 16, 2012, and the district court appointed counsel to represent him. (R., pp.101, 108-109.)

Diehl filed a pro se Motion for Correction of Illegal Sentence, based on Idaho Criminal Rule 35(a), which he later amended, claiming his sentence is illegal because, *inter alia*, he was not present when the district court placed him on probation following his rider. (R., pp.118-122, 124-127, 133-137.) At a hearing on August 13, 2012, Diehl argued his Motion for Correction of Illegal Sentence on his own behalf. (R., pp.180-181; 8/13/12 Tr., p.326, L.7 - p.329, L.18.) On August 23, 2012, the district court issued an Order on Motions, denying Diehl's Motion for Correction of Illegal Sentence and concluding that Diehl's presence when he was placed on probation was not legally

mandated.[2] (R., pp.182-185.) Diehl filed a timely appeal from that order. (R., pp.193-197.)

[2] That same date, the state filed a Motion to Dismiss Without Prejudice the Report of Probation Violation filed previously "for the reason that there is currently a federal indictment for Mr. Diehl's arrest" (R., pp.188-189), which was granted (R., pp.190-191).

## ISSUES

Diehl states the issues on appeal as:

1. Did the district court violate Idaho law and Mr. Diehl's constitutional rights to due process and to be free from unreasonable search and seizures when it placed him on probation *in absentia* and without consent?

2. Assuming, arguendo, that Mr. Diehl could be placed on probation in absentia and without his consent, can conditions of probation be imposed on him in absentia and without his consent?

(Appellant's Brief, p.3.)

The state rephrases the issues on appeal as:

Has Diehl failed to show any error in the district court's denial of his Rule 35 motion for correction of an illegal sentence?

## ARGUMENT

### Diehl Has Failed To Show Any Error In The District Court's Denial Of His Rule 35 Motion For Correction Of An Illegal Sentence

### A. Introduction

Diehl challenges the district court's denial of his Rule 35 motion to correct an illegal sentence. Diehl argues that the district court violated Idaho law (I.C. § 19-2503 and I.C.R. 43) and his constitutional rights to be free from unreasonable search and seizures by placing him on probation *in absentia* and without his consent. (Appellant's Brief, pp.4-8.) Diehl also contends that, even if he could be placed on probation *in absentia* and without his consent, "[b]ecause [he] did not consent to any conditions of probation, they must be declared void *ab initio*, with his probation converted to one for which there are no conditions." (Id., p.8.)

Diehl's arguments fail because (1) the district court's order of probation following his retained jurisdiction does not constitute an illegal sentence under I.C.R. 35(a), and (2) even if construed as a motion "to correct a sentence that has been imposed in an illegal manner" pursuant to I.C.R. 35(b), Diehl's motion cannot be reviewed by this Court because it was filed more than 120 days from the entry of the order placing him on probation.

### B. Standard Of Review

"'Generally, whether a sentence is illegal or whether it was imposed in an illegal manner is a question of law, over which [the appellate court] exercise[s] free review.'"

State v. Clements, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009) (quoting State v. Farwell, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007).

C. Diehl Has Failed To Show Error In The Denial Of His Rule 35 Motion

Pursuant to Idaho Criminal Rule 35(a) a district court "may correct a sentence that is illegal from the face of the record at any time." However, under I.C.R. 35(b), a motion to reduce a sentence, or correct a sentence that was imposed in an illegal manner, "must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction . . . ." Because these filing limitations are jurisdictional, the district court lacks jurisdiction to grant any motion requesting relief that is filed after the time limit proscribed by the rule. State v. Sutton, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987); State v. Fox, 122 Idaho 550, 835 P.2d 1361 (Ct. App. 1992) ("The filing deadlines described in [Rule 35] create a jurisdictional limitation on the authority of the trial court to entertain motions under the rule. Without a timely filing, the court cannot consider the motion." (internal citations omitted)). Diehl's Motion for Correction of Illegal Sentence (R., pp.124- 127) was filed more than 120 days after both his Judgment of Conviction (R., pp.70-74) and Retained Jurisdiction Order of Probation (R., pp.81-88) were entered. Therefore, under Rule 35(a), the district court *only* had jurisdiction to consider whether Diehl's sentences were "illegal from the face of the record."

In Clements, 148 Idaho at 86, 218 P.3d at 1147, the Idaho Supreme Court explained what constitutes an illegal sentence under Rule 35:

> [T]he term "illegal sentence" under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing. This interpretation is harmonious with current Idaho law. As this Court recently noted in *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007), Rule 35 is a "narrow rule." Because an illegal sentence may be corrected at any time, the authority conferred by Rule 35 should be limited to uphold the finality of judgments. Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal; rather, *the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law* or where new evidence tends to show that the original sentence was excessive.

(Emphasis added.)

Diehl's conviction for felony fleeing or attempting to elude a peace officer carried a maximum penalty of five years imprisonment. I.C. §§ 49-1404; 18-112; see State v. McCoy, 128 Idaho 362, 913 P.2d 578 (1996). Diehl's underlying sentence for that crime -- a unified four years with one and one-half years fixed (R., pp.70-71) -- was well within the sentence authorized by law. The same is true of Diehl's unified four-year sentence (with two years fixed) for felony malicious injury to property, which had a maximum sentence of five years imprisonment. I.C. § 18-7001(2). The district court's order that Diehl be in the retained jurisdiction program for up to 365 days, and its subsequent placement of Diehl on probation, were both authorized by I.C. § 19-2601. The district court correctly concluded Diehl "was simply placed on probation consistent with the Court previously retaining jurisdiction. In view of the crimes for which [Diehl] was convicted, [he] has failed to show how the sentences for those crimes were illegal." (R., pp.183-184.) There is nothing about Diehl's sentences to suggest they were illegal from the face of the record, or that they were unauthorized by law.

If Diehl's Rule 35 motion is construed as having alleged, pursuant to I.C.R. 35(b), that his sentences -- specifically, being placed on probation and the terms and conditions of probation -- were imposed in an illegal *manner*, the district court lacked jurisdiction because Diehl filed his Rule 35 motion on June 20, 2012 (see R., pp.124-127), two weeks after the expiration of the 120-day period to file such a motion from the February 9, 2012 entry of the Retained Jurisdiction Order of Probation (see R., pp.81-88). Sutton, 113 Idaho 832, 748 P.2d 41.

Even if this Court considers the merits of Diehl's arguments, he has failed to show any error -- statutory, criminal rule, or constitutional -- in the district court's order placing him on probation and requiring him to comply with the terms and conditions of probation set forth in that order. (See R., pp.81-88.) Idaho appellate courts have repeatedly held that no hearing is required before the district court relinquishes jurisdiction pursuant to I.C. § 19-2601. State v. Law, 131 Idaho 90, 952 P.2d 905 (Ct. App. 1998); State v. Smith, 130 Idaho 450, 942 P.2d 574 (Ct. App. 1997). State v. Goodlett, 139 Idaho 262, 77 P.3d 487 (2003) (no due process rights have been created by I.C. § 19-2601, which means there is no right to a hearing). Having no right to a hearing on the district court's decision whether to relinquish jurisdiction or place him on probation, Diehl did not have any right to be present when that decision was made.

Moreover, I.C. § 19-2601(4) states, "Placement on probation shall be under such terms and conditions as the court deems necessary and expedient. . . . Probation is a matter left to the sound discretion of the court." In the absence of any right to a hearing or to be present when the probation decision was made, and given the discretion

granted the district court, Diehl has failed to show any illegality or abuse of discretion in the district court's order placing him on probation pursuant to the terms and conditions set forth in the order of probation.[3] Even if Diehl had the right to take positive steps to refuse probation and its terms and conditions (see Appellant's Brief, p.5), he has not shown that after he received (or became aware of) the district court's probation order, he did anything to inform the court he was rejecting probation. (See Appellant's Brief, p.5.) Not only has Diehl failed to show that he took any overt steps to reject probation and its terms, he has failed to provide any authority to support the notion that a court can order probation terms only *if* the defendant expressly agrees to such terms in court -- vis-à-vis saying nothing but accepting release. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking."). Therefore, Diehl has failed to show that the court-ordered probationary terms and conditions did not fully apply to him.[4]

Diehl argues that his sentences were illegally modified when he was placed on probation without his presence (and without his consent), contrary to I.C. § 19-2503 and

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[3] It is well established that the terms and conditions of probation must be contained in a written order granting probation. State v. Hancock, 111 Idaho 835, 837, 727 P.2d 1263, 1265 (Ct. App. 1986) (citing Ex parte Medley, 73 Idaho 474, 480, 253 P.2d 794, 797 (1953)). The district court's Retained Jurisdiction Order of Probation included the terms and conditions of probation, although they do not appear to have been signed by Diehl. (See R., pp.81-88.)

[4] Inasmuch as the terms and conditions of Diehl's probation are valid, his request to remand this case so the district court can declare his conditions of probation void *ab initio* and give him "a hearing at which he can either accept or decline probation and its attendant conditions" (Appellant's Brief, p.10), must be rejected.

I.C.R. 43. Diehl is incorrect. I.C. § 19-2503 says, "For the purpose of judgment, if the conviction is for a felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence." I.C.R. 43(a) requires the presence of a defendant "at the arraignment, at the time of the plea, at every stage of the trial . . . and at the *imposition of sentence*, except as otherwise provided by this rule." (Emphasis added.) The district court rejected Diehl's argument, stating:

> Defendant also argues that the Court "modified the sentence" without Defendant's presence after Defendant completed the retained jurisdiction program. As the record reflects, at the time of sentencing the Court retained jurisdiction to consider probation at a later date. The Court thereafter received the report (APSI) from the Department of Corrections wherein it was recommended that the Court consider probation. The Court thereafter placed Defendant on probation. Contrary to Defendant's argument, there was no modification of the sentence. Defendant was simply placed on probation consistent with the Court previously retaining jurisdiction. In view of the crimes for which Defendant was convicted, Defendant has failed to show how the sentences for those crimes were illegal.

(R., pp.183-184)

The district court correctly concluded that placing Diehl on probation following his successful rider did not constitute a "modification of the sentence" (i.e., "imposition" of sentence) which would have necessitated Diehl's presence at a hearing. (Id.) As explained in Bojorquez v. State, 135 Idaho 758, 761, 24 P.3d 706, 709 (Ct. App. 2000):

> [T]here is an important distinction between the "imposition of a sentence" which requires the presence of the defendant and later actions by the trial court which affect the sentence after its imposition. Idaho appellate courts have long adhered to the principle that a sentence is imposed when initially pronounced even if its execution is later postponed when the trial court suspends the sentence or retains jurisdiction pursuant to I.C. § 19-2601(4). *See State v. Ditmars*, 98 Idaho 472, 474, 567 P.2d 17, 19 (1977); *State v. Alvarado*, 132 Idaho 248, 249, 970 P.2d 516, 517 (Ct. App. 1998); *State v. Lundquist*, 122 Idaho 190, 192, 832 P.2d 761, 763

(Ct. App. 1992); *State v. Omey*, 112 Idaho 930, 932, 736 P.2d 1384, 1386 (Ct. App. 1987); *State v. Salsgiver*, 112 Idaho 933, 934, 736 P.2d 1387, 1388 (Ct. App. 1987).

See also State v. White, 107 Idaho 941, 694 P.2d 890 (1985) (refusing to overrule Ditmars).

Unlike the imposition of sentence, probation is the suspension of such a sentence, and the defendant need not be present when probation is ordered for probation to be valid. See I.C. § 19-2601(2); State v. Stover, 140 Idaho 927, 931-32, 104 P.3d 969, 973-74 (2005) (implicitly holding that probation is not a part of the sentence because "[t]here is nothing in I.C. § 19-2521 that extends the maximum penalty for [the defendant's] crime."). Therefore, Diehl's sentence was *imposed* on October 3, 2011, when the district court pronounced its underlying sentences and retained jurisdiction. By placing Diehl on probation following his rider, the district court merely suspended execution of his previously imposed sentences; consequently, his presence and/or consent were not required before he was placed on probation subject to the terms and conditions of probation. Diehl's claim that the district court's probation order was illegal because it violated either Idaho Code § 19-2503 or I.C.R. 43, or constituted an abuse of discretion, fails.

Finally, Diehl has failed to show that any of his constitutional due process rights were violated by the district court making its probation decision outside his presence. Idaho Code § 19-2601 did not create a protectable liberty interest in the district court's decision whether to relinquish jurisdiction, and Diehl was not entitled to a hearing, much

less to be present at a hearing, when that decision was made. As explained in State v. Denny, 122 Idaho 563, 835 P.2d 1374 (Ct. App. 1992):

> According to the authority of *State v. Ditmars*, 98 Idaho 472, 474, 567 P.2d 17, 19 (1977), *cert. denied* 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed.2d 793 (1978), a defendant is not entitled to an evidentiary hearing when the district court relinquishes jurisdiction after a period of retained jurisdiction. *See also State v. White*, 107 Idaho 941, 694 P.2d 890 (1985) (refusing to overrule *Ditmars*). As stated in *Ditmars*, it is at the pronouncement of sentence where the defendant is accorded the constitutional protections that Denny seeks. *Ditmars*, 98 Idaho at 474, 567 P.2d at 19; *State v. Bell*, 119 Idaho 1015, 1017, 812 P.2d 322, 324 (Ct. App. 1991). A termination of retained jurisdiction is neither an imposition of sentence nor a revocation of a probation and, in that regard, no hearing is required. *Bell*, 119 Idaho at 1017, 812 P.2d at 324 (citing *Belknap v. State*, 98 Idaho 690, 571 P.2d 336 (1977)). Thus, a hearing before the trial court is not required as a condition precedent to that court's relinquishing its retained jurisdiction under I.C. § 19-2601(4).

Denny, 122 Idaho at 564, 835 P.2d at 1375.

Idaho appellate courts have repeatedly held that no hearing is required before the district court relinquishes jurisdiction pursuant to I.C. § 19-2601. Law, 131 Idaho 90, 952 P.2d 905; Smith, 130 Idaho 450, 942 P.2d 574. In Goodlett, 139 Idaho at 264, 77 P.3d at 489, the Idaho Court of Appeals explained that in State v. Coassolo, 136 Idaho 138, 30 P.3d 293 (2001), the Idaho Supreme Court held "that an inmate's hope or expectation of probation at the conclusion of the retained jurisdiction period was not a liberty interest protected by the Due Process Clause," and, therefore, "there exists no constitutional requirement of a hearing either at the correctional facility or in the trial court before the court determines whether to relinquish jurisdiction or to place the defendant on probation." Inasmuch as defendant's have no due process right to a hearing when a district court makes a probation decision following retained jurisdiction,

there cannot be any due process right for them to be present when such a determination is made.

Diehl has failed to show that, because he did not expressly agree the terms and conditions of his court-ordered probation, he was not subject to them. By retaining jurisdiction pursuant to I.C. § 19-2601, the court merely suspended the execution of Diehl's already imposed sentence for the specified period of retained jurisdiction. At the termination of that period, the district court's retained jurisdiction was not revoked but merely expired, therefore, Diehl's presence and consent was not required by I.C. § 19-2503 or I.C.R. 43 when the court made its probation decision.[5] Because no liberty interest was created by the statute authorizing the district court to retain jurisdiction, none of Diehl's due process rights were violated when the court made its probation decision outside his presence. Accordingly, Diehl has failed to demonstrate any abuse of discretion in the district court's denial of his Motion for Correction of Illegal Sentence.

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[5] Inherent in Diehl's argument that the district court's probation decision was illegal because it was made outside his presence and without his consent is that he did not, and does not now, consent to probation. Inasmuch as Diehl's entire argument is based on his rejection of probation, the only available remedy appears to be to vacate the probation order and execute the sentence of imprisonment. In addition, it is clear that not all sentence modifications, as opposed to initial sentencings, require the presence of the defendant. See State v. Chavez, 134 Idaho 308, 315, 1 P.3d 809, 816 (Ct. App. 2000) (modifying Chavez's sentence for escape to a consecutive one-year determinate term of imprisonment.)

## CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Diehl's Motion for Correction of Illegal Sentence.

DATED this 26th day of December, 2013.

JOHN C. McKINNEY
Deputy Attorney General

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of December, 2013 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm